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Supreme Court, U.S.
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No. 95-605

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

October Term 1995

OKLAHOMA ASSOCIATION FOR
EQUITABLE TAXATION,

Petitioner,

v.

THE CITY OF OKLAHOMA
CITY, OKLAHOMA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF OKLAHOMA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why the Court should grant the Petition. Respondent concedes:

1. That the Court has never decided whether a tax rebate authorized solely on the basis of age violates the Equal Protection Clause;

2. That evolving standards of equality have come to be embodied in State and Federal legislation prohibiting solely aged-based discrimination;

3. That this Court has not, in light of legislation eschewing age-based discrimination, squarely addressed whether age-based classifications warrant heightened scrutiny[1]; and

4. That this Court has not squarely decided whether a taxing scheme which is subject to approval by the electorate and which exempts certain members of the electorate from taxation, impinges on the right to

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1 Respondent contends (Opp. 4) that this question has been analytically assessed by the Court in recent cases. However, the quoted language cited by Respondent clearly indicates that the Petitioners therein asserted their challenge "at the level of rational basis" and that this Court merely restated, without analysis, its prior holdings with respect to the level of scrutiny applied to age-based classifications.

vote in a manner violative of the Equal Protection Clause.

The issues presented are ripe for resolution in this case. In fact, as Respondent points out (Opp. 6), the highest Courts of at least three (3) other states (Idaho; Wisconsin; and Illinois) have upheld solely age-based tax classifications favoring senior citizens. Accordingly, as Petitioner has previously argued (Pet. 7), this case presents important questions of law about the extent to which, consistent with the Constitution, government can utilize age as the sole basis for exemption from taxation; which questions should be decided by the Court.

I. The Court Should Grant the Petition to Resolve the Question of Whether The Aged-Based Rebate Scheme Challenged Here Violates the Equal Protection Clause.

A. The Rebate Scheme is Not Rationally Related to a Legitimate Governmental Interest.

With respect to the merits argument set forth in the Respondent's Opposition, the Petitioner would point out to the Court that the Respondent (Opp. 7), like the Oklahoma Supreme Court below, has once again failed to articulate any legitimate governmental interest that is served by the rebate scheme. Rather, the Respondent has simply identified several **potential** differences between **some** senior and **some** non-senior citizens.

Merely identifying potential differences does not constitute the articulation of a legitimate governmental policy. As the Sixth Circuit held in Doe by Doe v. Cowherd, 965 F.2d 109, 112 (1992):

> "It is clear that the mere identification of differences is not enough; equal protection `require[s] that a distinction made have some relevance to the purpose for which the classification is made.' Austin, 848 F.2d at 1394, citing Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760, 762-63, 15 L.Ed 2d 620 (1966)."

To properly articulate a legitimate governmental purpose, the government must start with a neutral premise unburdened by the ultimate classification. In this case that premise would look something like the following:

(a) Certain citizens (not senior citizens) of limited wealth and/or income will be adversely affected by the sales tax increase; and

(b) Such citizens should be relieved, to some extent, of the burden of the sales tax increase; therefore

(c) A tax rebate should be granted to such citizens.

It is difficult to discern the underlying premise on which the Respondent's alleged tax relief policy was grounded because the Respondent never briefed or

argued that policy, either at the trial level (at trial Respondent argued that **any** policy that **favors** senior citizens is legitimate (Pet. 17), or on appeal (on appeal Respondent argued that the sales tax was really a "user fee" (Pet. 18)). The first time the alleged policy appears is in the post-hoc rationalization set forth in the opinion of the Oklahoma Supreme Court.

However, the Oklahoma Supreme Court's articulation of the governmental interest ("providing senior citizens...with tax relief") is nothing more than an unreasoned restatement of the classification it purports to justify.

As observed by the Court of Appeals for the Third Circuit in Delaware River Basin Commission v. Bucks County Water & Sewer Authority, 641 F.2d 1087, 1099-1100 (3d Cir.1981):

> "Various commentators have observed that it is always possible to hypothesize that the purpose underlying a classification is the goal of treating one class differently from another. A statute's classifications will invariably be rationally related to a purpose so defined, since the "purpose" is, in effect, a restatement of the classification. To engage in such hypothesizing, however, would render the rational basis standard no standard at all."

Once a neutral premise for sales tax relief is articulated, then the question becomes how to classify citizens in a way

that will channel the rebate to the citizens that are adversely affected by the sales tax increase.

The Respondent's argument is that age can be used as a proxy for the determination of "adverse impact". In effect, the Respondent, as well as the Oklahoma Supreme Court, is arguing that **all** senior citizens are adversely impacted by the sales tax increase, while **no** non-senior citizens are adversely impacted by the sales tax increase. Such an argument, and the classification based thereon, is patently irrational and arbitrary.

Respondent chides Petitioner for stating that by some estimates, 60% of the wealth in the United States is held by senior citizens (Opp. 2); because that statement "was neither raised in the proceedings below nor is it relevant" (Opp. 2). Respondent then proceeds to cite misleading 1990 Census statistics which it never raised in the proceedings below (Opp. 2). The respondent failed to state whether its statistics on "median income" included unearned or only earned income (retired persons would naturally have less earned income), or income such as social security payments, tax-free income and the like; all or part of which would be excluded from income for Federal income tax purposes.

Furthermore, Respondent fails to explain why (in its unreasoned opinion) wealth is "irrelevant" (Opp. 2) to the case at bar. The fact that Respondent chose to ignore senior citizen wealth when it devised the tax rebate scheme does not make it irrelevant and any statement to the contrary

is nothing more than the Respondent's bald assertion.

A review of the same 1990 Census cited by the Respondent reveals the following, more relevant, statistics for Oklahoma City. Senior citizens account for only 14.7% of the City's population. There are 69,096 persons (15.9% of the total population) with income **less** than the poverty level; but **only** 6,515 persons over the age of sixty-five (13.1% of all persons over 65) have income **less** than the poverty level. In other words, only 9.5% of all persons living under the poverty line are senior citizens.

The Respondent's median income statistics, based solely on households, also failed to take into account the fact that a large proportion of householders under 65 have children. Apparently, Respondent must not believe that having children has an impact on disposable income. When children are considered, per capita income in Oklahoma City drops to $13,528 per person. Additionally, Respondent's statistics fail to take into account that there are more than just two age groups extant in society. What, for example, is the median income for persons aged 18-30, many of whom are students and have no income?

The Petitioner contends that the Respondent has not, nor has the Oklahoma Supreme Court even attempted to, much less adequately, explain why the Respondent chose to deny rebates to those non-senior citizens adversely impacted by the sales tax increase. As the Eighth Circuit state in Ranschburg v. Toan, 709 F.2d 1207, at 1211 (1983):

> "Although states may have great discretion in the area of social welfare, they do not have unbridled discretion. **They must still explain why they chose to favor one group of recipients over another**...Therefore, we cannot accept the state's contention that the challenged classification is rationally based because the legislature chose to provide Utilicare benefits to some totally disabled persons, but not to others, i.e., that it did what it intended to do. To accept this reasoning would, in effect, render the rational basis test a nullity and would `suspend the operation of the Equal Protection Clause in the field of social welfare law.' Hagans v. Lavine, 415 U.S. 528, 539, 94 S.Ct. 1372, 1380, 39 L.Ed.2d 577 (1974)." (Emphasis supplied).

If tax relief for those most adversely affected by the sales tax increase was the public policy underlying the rebate scheme, then the use of an age-based classification which **excludes 90% of those truly in need while including 87% of senior citizens who are not truly in need**, is "so attenuated as to render the distinction arbitrary and irrational." City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 446 (1985).

The Respondent's rebate scheme denies tax relief to over 90% of the citizens of

Oklahoma City living **below** the poverty line (i.e. approximately 62,500 persons), while simultaneously granting tax relief to 87% of senior citizens living **above** the poverty line (i.e. approximately 58,500 persons). Moving the demarcation line to an income level above the poverty line would have some impact on the percentage of senior citizens deemed in real need of tax relief; however, no matter where the true need line is drawn, it is doubtful that the 90% figure would significantly change given that 86% of the population is under the age of 65. In other words, there are approximately six times more citizens under 65 than over 65, and therefore for every additional senior citizen included in the true need category as a result of using a different base line, there will be four, five, six or perhaps more persons under 65 who will also be included in the true need category.

Turning to the "user fee" issue, it is clear that the Respondent's contention that it "was not irrational for the City Council to believe that: ...(2) senior citizens would be less likely to use the facilities built by the MAPS tax increase" (Opp. 7) is nothing more than the **ipse dixit** of the Respondent which not only is unsupported by any legislative fact contained in the record below, but also defies common knowledge and experience.

There is absolutely no known correlation between: (i) the amount of sales tax a person pays; and (ii) the degree to which a person utilizes public services or facilities, and the Respondent made no attempt to establish such a

correlation on the record either at the trial level or on appeal.

The Court has made it clear for at least the last one hundred (100) years that a tax levy is not invalid on the ground that the persons taxed receive no benefit from the expenditure of the money. Wagoner v. Evans, 170 U.S. 588 (1898). Taxpayer lawsuits attempting to avoid the payment of taxes on the theory that the taxpayer received no benefit from the expenditure of the taxes paid have generally been viewed as coming from the extremist political fringe of society and have been summarily dealt with by courts at all levels. The affixation of the Respondent's imprimatur to such views is counterintuitive and demonstrates the lack of a rational basis for the rebate scheme.

If the Respondent wanted to rationally impose the cost of the MAPS facilities on the actual users, then it would have funded the facilities with revenue bonds rather than a general sales tax. Additionally, as indicated above with respect the tax relief canard, the Respondent has failed to explain why it chose to favor one group of **potential** non-users over all other potential groups of non-users such as non-senior citizens who die or move out of town before the facilities are built, or passing tourists or non-individuals such as corporations, or persons who would not use the facilities simply because they have no interest in baseball or hockey or the like.

The user fee artifice is also nothing more than another post-hoc rationalization unsupported by the record.

B. The Rebate Scheme Impinges on the Right to Vote.

The Respondent once again concedes, having never disputed, Petitioner's contention that the rebate scheme was intended to influence senior citizens not to vote against the sales tax increase. The Respondent's attempt to ignore the issue is but a continuation of its four line non-response at the trial level wherein the Respondent stated that it would "simply disregard" the Petitioner's argument; and its total non-response on appeal to the Oklahoma Supreme Court.

The Respondent attempts to cabin the protection afforded by the Equal Protection Clause by contending (Opp. 10) that the question presented is limited to the concept of "one person, one vote", and therefore the equal protection guarantee was not violated because each senior citizen had only one vote.

As the Seventh Circuit has observed, the "gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the states' actions." Briscoe v. Kasper, 435 F.2d 1046, 1052 (7th Cir. 1970).

The issue presented here is whether the 14th Amendment protects the electorate against actions designed to debase the rights of all voters in an election. In other words, may a governmental entity in essence **stack the deck** in favor of a "yes" vote by offering cash incentives to a

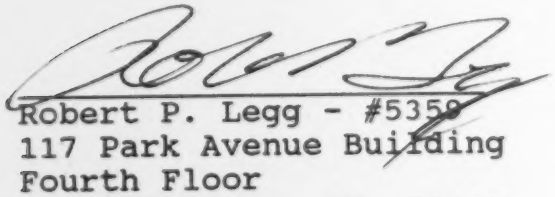
certain portion of the electorate.

The question presented, although phrased in terms of equal protection, is based on Petitioner's argument below which also fairly included the due process protection (non-classification based) of the 14th Amendment.

CONCLUSION

The Writ should be granted.

Respectfully Submitted,



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